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In The

Supreme Court of the United States

DR. HERMAN SMITH,

Petitioner,

v.

KAREN JO BARROW,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 3

ARGUMENT 5

A. The test for "clearly established law" should be not only knowing that a right exists, but knowing what standard applies in evaluating the action that interfered with that right 5

B. A pretrial determination of a constitutional question in a qualified immunity appeal should not deny the defendant the opportunity to argue his objective good faith to the jury 9

C. Reversal is necessary to ensure efficient operation of local governments 12

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Bd. Of Trs. of the Univ. of Ala. v. Garrett,
531 U.S. 356 (2001) 7

Bolling v. Sharpe,
347 U.S. 497 (1954) 6

Butz v. Economou,
438 U.S. 478 (1978) 9

Cozzo v. Tangipahoa Parish Council-President Gov't,
279 F. 3d 273 (5th Cir. 2002) 3

Davis v. Scherer,
468 U.S. 183 (1984) 6

Elder v. Holloway,
510 U.S. 510 (1994) 1

Elliot v. Perez,
751 F.2d 1472 (5th Cir. 1985) 10

FCC v. Beach Communications, Inc.,
508 U.S. 307 (1993) 7

Fla. Bar v. Went For It, Inc.,
515 U.S. 618 (1995) 8

Gregoire v. Biddle,
177 F.2d 579 (2nd Cir. 1949) 10

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 2, 4, 5, 9, 10

Heller v. Doe,
509 U.S. 312 (1993) 7

Johnson v. Breeden,
280 F.3d 1308 (11th Cir. 2002) 11

Littlefield v. Forney Indep. Sch. Dist.,
268 F.3d 275 (5th Cir. 2001) 6

Malley v. Briggs,
475 U.S. 335 (1986) 3

McClendon v. City of Columbia,
258 F.3d 432 (5th Cir. 2001) 6

McLaughlin v. Florida,
379 U.S. 184 (1964) 7

Mitchel v. Forsythl,
472 U.S. 511 (1985) 10

Oliveira v. Mayer,
23 F.3d 642 (2d Cir. 1994) 11

Pagan v. Fruchey,
492 F.3d 766 (6th Cir. 2007) 8

Pierson v. Ray,
386 U.S. 547 (1967) 10

Poe v. Ullman,
367 U.S. 497 (1961) 6

Saucier v. Katz,
533 U.S. 194 (2001) 5, 6, 10

Siegert v. Gilley,
500 U.S. 226 (1991) 5, 10

United States v. Virginia,
518 U.S. 515 (1996) 7

Willingham v. Crooke,
412 F.3d 553 (4th Cir. 2005) 11, 12

Wis. v. Yoder,
406 U.S. 205 (1972) 8

Wood v. Strickland,
420 U.S. 308 (1975) 10

OTHER SOURCES

SUP. CT. R. 37.6 1

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INTEREST OF *AMICUS CURIAE*[*]

The International Municipal Lawyers Association (IMLA) is a nonprofit professional organization that serves as a resource for local government attorneys. IMLA is an advocate for the nation's local governments and provides its 1,400 members with information and advice on legal issues facing local governments.

Local governments are composed of numerous public officials, including but not limited to, police officers, librarians, building inspectors, code enforcement officers, and elected officials. The doctrine of qualified immunity shields public officials from damages actions unless their conduct was unreasonable in light of clearly established law. *Elder v. Holloway*, 510 U.S. 510, 512 (1994). There are nearly 87,900 local governments in the United States, including over 3,000 county governments, over 19,400 municipal governments, over 16,500 townships, over 13,500 school districts and over 35,100 special districts.[1] With more than 11.5 million full-time

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[*] Counsel of record for all parties waived the right to receive notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. The parties' consent to amicus briefing and the waiver of the 10 days notice requirement is being filed concurrently with this brief. In accordance with SUP. CT. R. 37.6, amici states that no counsel for either party has authored this brief in whole or in part, and no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

[1] *See* U.S. Bureau of Census, Federal, State and Local Governments, 2002 Census of Governments, *Preliminary Report*

employees,[2] local governments account for 10.5% of full-time employment in the United States.[3] By contrast, state governments account for only 3.5% and the federal government for only 2.2% of full-time employment.[4]

The members of IMLA have an immediate interest in the departure by the Fifth Circuit from the well-established principles of qualified immunity for public officials. More specifically, the threshold standard for imposing personal liability on a public official must be clarified and applied uniformly across the United States. A judicial interpretation that admits that the standard for evaluating the public official's action is not clear, but still imposes liability, greatly diminishes the firmly rooted tradition of immunity jurisprudence. The central purpose of affording public officials qualified immunity from suit is to protect them "from undue interference with their duties and from potentially disabling threats of liability." *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). Public officials routinely make decisions that place limits on a

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No. 1, July 2002 *available at* http://ftp2.census.gov/govs/cog/2002COGprelim_report.pdf.

[2] *See* U.S. Bureau of Census, *Local Government Employment and Payroll*, March 2003, *available at* http://ftp2.census.gov/govs/apes/03locus.txt.

[3] *See* U.S. Department of Labor, Bureau of Labor Statistics, *Industry at a Glance*, December 29, 2005, *available at* http://www.bls.gov/iag/government.htm.

[4] *Id.*

citizen's or employee's constitutional rights. They limit the expression of dancers in sexually oriented businesses, they limit religious expression on police uniforms and in public areas, and they put internet filters on library computers, to name a few examples. Public officials also know that these decisions are subject to three possible levels of scrutiny — rational basis, heightened scrutiny, or strict scrutiny — depending on the constitutional right being infringed. Thus, if it is arguable that only a rational basis and not strict scrutiny should apply in evaluating a particular action, the official cannot be said to act with conscious disregard for the established law when the standard for evaluating their conduct is unclear.

STATEMENT OF THE CASE

IMLA adopts the Statement of the Case set forth in the Brief of Petitioner.

SUMMARY OF ARGUMENT

It is well-settled that public officials are protected by the doctrine of qualified immunity. "The Supreme Court has characterized the doctrine as protecting all but the plainly incompetent or those who knowingly violate the law.'" *Cozzo v. Tangipahoa Parish Council-President Gov't*, 279 F.3d 273 (5th Cir. 2002) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). A required element of the imposition of liability on a public official has always been a threshold showing of a violation of a "clearly established law." This case requires that the Supreme Court determine whether the law is "clearly established" when there is judicial disagreement in the

case about the standard of review of the public official's action. Additionally, does a pretrial determination of a constitutional question in a qualified immunity appeal deny the defendant the opportunity to have his immunity protection decided by the facts determined by the jury?

In resolving this matter, the Court should hold that the standard for "clearly established law" is not only knowing that a constitutional right exists, but knowing what standard applies in evaluating the action that interfered with that right. There is nothing in the history of the doctrine that supports using a different standard. The standard that the Fifth Circuit suggests should be flatly rejected. Instead, the Court should apply the test that has evolved in qualified immunity jurisprudence. This will bring a consistency in standards across the federal circuits, while confirming the importance of the qualified immunity protections balanced against the rights of the citizen or employee.

The Fifth Circuit's broad interpretation of "clearly established law" will result in public officials acting with timidity and hesitation while they research conflicting legal opinions and attempt to determine future federal precedent. Even the experienced District Court jurist was unaware of "this clearly established law" when he evaluated the school administrator's conduct by a rational basis standard. Dilution of the protections of qualified immunity may deter able people from public service and inhibit public servants in their discretionary actions. *Harlow*, 457 U.S. at 815 – 17.

Finally, a pretrial determination of a Constitutional question in a qualified immunity appeal should not deny the defendant the opportunity to argue his objective good faith to the jury. A summary judgment motion is a threshold determination based on the facts as *alleged* by the plaintiff. The intent is to protect the public servant from the substantial costs of litigation, prevent excessive disruption of government, and permit resolution of patently insubstantial claims. *Id.* at 818-19. It should not operate to deprive the public servant the opportunity to prove his entitlement to qualified immunity based on the factual determination made by the jury. A public official cannot reasonably be said to "to know" that the law forbade such conduct, when the jury found that the conduct that required heightened scrutiny of his actions did not take place. This Court should grant Smith's petition in order to address these important issues concerning qualified immunity.

ARGUMENT

A. The test for "clearly established law" should be not only knowing that a right exists, but knowing what standard applies in evaluating the action that interfered with that right.

To determine whether a public official is entitled to qualified immunity, the court must first answer the threshold question whether, taken in the light most favorable to the party asserting the injury, the alleged facts show that conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (citing *Siegert v. Gilley*, 500 U.S. 226, 232 (1991)). "If no

constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Id.* If a violation could be made out on a favorable view of the parties' submissions, "the next, sequential step is to ask whether the right was clearly established." *Id.*; *Davis v. Scherer*, 468 U.S. 183, 190 (1984). "The objective reasonableness of allegedly illegal conduct is assessed in light of the rules clearly established at the time it was taken." *McClendon v. City of Columbia*, 258 F.3d 432, 438 (5th Cir. 2001) (footnote omitted). Thus, "clearly established" includes the rules in existence for evaluating the conduct, not just the existence of the right. For more than eighty years, the due process interest of parents to direct the upbringing and education of their children, standing alone, warranted no more than rational-basis review. *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 289 (5th Cir. 2001).

In general, "liberty under law extends to the full range of conduct which the individual is free to pursue." *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *see also Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (describing liberty as "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints"). The recognition of a parent's liberty interest in choosing to educate her children in a private school does not *per se* mean that it is a fundamental right subject to strict scrutiny.

Generally, the equal protection guarantee of the Constitution is satisfied when the government

differentiates between persons for a reason that bears a rational relationship to an appropriate governmental interest. *See Heller v. Doe*, 509 U.S. 312, 320 (1993). However, in limited circumstances when the subject of the different treatment is a member of a class that historically has been the object of discrimination, the Supreme Court has required a higher degree of justification than a rational basis, either strict or intermediate scrutiny. Under the strict scrutiny test, the government must demonstrate a compelling need for the different treatment and that the provision in question is narrowly tailored to achieve its objective. *See McLaughlin v. Florida*, 379 U.S. 184, 192 (1964). Under intermediate scrutiny, the government must at least demonstrate that the classification is substantially related to an important governmental objective. *See United States v. Virginia*, 518 U.S. 515, 533 (1996). The suspect or quasi-suspect classes that are entitled to heightened scrutiny have been limited to groups generally defined by their status, such as race, national ancestry or ethnic origin, alienage, gender and illegitimacy, and not by the conduct in which they engage. The administrator's decision in this case, was based on the conduct that the employee engaged in — choosing to educate her children in a private school — and not on her status. Where rational-basis scrutiny applies, the government actor need not articulate his reasoning at the moment a particular decision is made. Rather, the burden is upon the challenging party to negate "'any reasonably conceivable state of facts that could provide a rational basis for the [regulation].'" *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001) (quoting *Heller*, 509 U.S. at 320; *FCC v. Beach*

Communications, Inc., 508 U.S. 307, 313 (1993)). Under a rationale basis analysis, the burden at trial should have been on the plaintiff to show that no reasonably conceivable state of facts existed to support the regulation.

Where heightened scrutiny applies, a restriction on a constitutional protected right will be upheld if the government "assert[s] a substantial interest in support of its regulation," "demonstrate[s] that the restriction directly and materially advances that interest[,]" and draws the regulation narrowly. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 624 (1995). Regulations on commercial speech or based on gender are some of the types of cases subject to a heightened scrutiny standard of review. *Pagan v. Fruchey*, 492 F.3d 766, 771 (6th Cir. 2007). By requiring the defendant superintendent to "prove that the employee's selection of private school materially and substantially affects the state's education mission," the Fifth Circuit is applying *de facto* heightened or strict scrutiny.

In *Barrow I* the parental interests were combined with free exercise interests, therefore the Fifth Circuit reversed the district court's finding of qualified immunity because of the application of a stricter standard than rational basis review. *See Wis. v. Yoder*, 406 U.S. 205, 233 (1972). ("When the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a reasonable relation to some purpose within the competency of the State is required to sustain the validity of the State's requirement under the First Amendment." (citations and internal quotations

omitted)). Thus, while the Court employed more than a rational basis standard with reference to the First Amendment free exercise clause, it is clear that the due process interest of parents to direct the upbringing and education of their children, standing alone, warranted no more than rational-basis review. *Barrow II* removed the possibility of a religious element to Barrow's claims. The Fifth Circuit, while acknowledging "it is possible to argue" that the rationale basis test applied, still maintained that the school district had the burden to show that Barrow's decision had a "materially adverse effect on the public school district". This impermissible shifting of the burden to the defendant superintendent, stripped him of the qualified immunity protection, a protection deemed necessary in order to have effective government. See *Harlow,* 457 U.S. at 817.

For all these reasons, this Court should reject a standard for "clearly established law" that admits that the standard of review that should apply under these circumstances is uncertain.

B. A pretrial determination of a constitutional question in a qualified immunity appeal should not deny the defendant the opportunity to argue his objective good faith to the jury.

Immunity protects the public from unwarranted timidity on the part of public officials by, for example, "encouraging the vigorous exercise of official authority," *Butz* v. *Economou,* 438 U.S. 478, 506 (1978), by contributing to "'principled and fearless

decision-making,'" *Wood* v. *Strickland,* 420 U.S. 308, 319 (1975) (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967) and by responding the concern that would, in Judge Hand's words, "'dampen the ardor of all but the most resolute, or the most irresponsible'" public officials. *Harlow,* 457 U.S. at 814 (quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2nd Cir. 1949) (L. Hand, J.), cert. denied, 339 U.S. 949 (1950); see also *Mitchel v. Forsythl,* 472 U.S. 511, 526 (1985) (lawsuits may "distract officials from their governmental duties"). Thus, the purpose of the immunity doctrine is not only to protect public officials from liability for damages, but also to protect them from substantial costs, which result from merely being required to defend. *Elliot v. Perez*, 751 F.2d 1472, 1476-79 (5th Cir. 1985). A summary judgment motion is merely a threshold determination. This initial inquiry requires the court to determine if the official's conduct violated a constitutional right by reviewing the alleged facts in the light most favorable to the party asserting the injury. *Siegert,* 500 U.S. at 232. The intent of allowing a ruling early on that issue is so that the costs and expenses of trial are avoided where the immunity defense is dispositive. *Saucier*, 533 U.S. at 200. It should not operate to deprive the public servant the opportunity to prove his entitlement to qualified immunity based on the factual determination made by the jury. A public official cannot reasonably be said to "to know" that the law forbade such conduct, when the jury found that the conduct that required heightened scrutiny of his actions, did not take place. When a case is remanded for trial following the denial of qualified immunity on appeal, the defendant official

is still entitled to assert the defense at the trial of the merits.

In this case, upon remand from the Fifth Circuit, the District Court refused to allow the Superintendent a reasonable opportunity to present evidence in support of his qualified immunity defense. The Fifth Circuit affirmed, citing the doctrine of the law of the case. In fact, because the jury actually rejected Barrow's free exercise claim that had been assumed during the first appeal and because additional evidence was offered at trial that was not presented during summary judgment, the "case" in *Barrow III* was not the same as the "case" in *Barrow I*. The Fifth Circuit's application of law of the case is at odds with other circuit courts and improperly insulated from review an incorrect ruling on substantive constitutional law — a ruling that is binding on thousands of public officials. For the Fifth Circuit to say that the jury's findings of fact are irrelevant to a public servant's entitlement to immunity ignores the considerable importance of qualified immunity in the efficient operation of government.

Although entitlement to qualified immunity is a legal question to be decided to the court, the factual issues underlying the qualified immunity analysis may be submitted to a jury. *Willingham v. Crooke*, 412 F.3d 553, 558-59 (4th Cir. 2005). In those cases in which genuine issues of fact material to the qualified immunity defense remain, the factual dispute should be resolved at trial by the trier of fact. *Johnson v. Breeden*, 280 F.3d 1308, 1318 (11th Cir. 2002); see also *Oliveira v. Mayer*, 23 F.3d 642, 650 (2d Cir. 1994)

("The District Court should have let the jury (a) resolve these factual disputes and (b) based on its findings, decide whether it was objectively reasonable for the defendants to believe that they were acting within the bounds of the law when they detained the plaintiffs"). This being the case, "the district court should submit factual questions to the jury and reserve for itself the legal question of whether the defendant is entitled to qualified immunity on the facts found by the jury." *Willingham*, 412 F.3d at 560. Since the jury rejected the free exercise claim in this case, the District Court should have reviewed the defendant's actions by the rational basis test. That is what District Court did in *Barrow I*, and he found that the superintendent was entitled to immunity.

C. Reversal is necessary to ensure efficient operation of local governments.

This case illustrates the type of decisions that should be entitled to qualified immunity protections. It is easy to see the potential difficulty public officials would have if the standard for clearly established violation of a constitutional right were diluted to the level set by the Fifth Circuit. Would every conflicting opinion issued among the circuits be subject to review and scrutiny by public officials in the hopes that the decisions they make guess which circuit's opinion will prevail in the future?

Public officials should be denied qualified immunity on summary judgment only when the alleged violation is of a clearly established constitutional right and the standard of review of that violation is clearly

understood as established by existing precedent. Even then, the defendant should be entitled to present evidence of his entitlement to immunity to the jury. Denial of the right to a qualified immunity defense under such circumstances will result in overburdening public officials and adversely affect operational efficiency of government. This case presents an opportunity to avoid such harm to public officials.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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